FILE COPY

Office-Supreme Court, U.S.
FILED
JUN 6 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. ~~1064~~ 102

CITY OF CHICAGO, ET AL., - - - Appellants,

versus

UNITED STATES OF AMERICA, ET AL., - Appellees.

On Appeal From the United States District Court for the Northern District of Illinois.

MOTION TO AFFIRM AND BRIEF IN SUPPORT OF THE MOTION.

CLIFFORD T. COOMES,
JOSEPH L. LENIHAN,
JAMES W. HOELAND,
908 W. Broadway,
Louisville, Kentucky 40201,

Attorneys for Appellee, Louisville and Nashville Railroad Company.

Of Counsel:
HARRY R. BEGLEY,
38 South Dearborn St.
Chicago, Illinois 60603

Date: June 4, 1969.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

SUBJECT INDEX.

	PAGE
I. The Motion	1
II. Brief in Support of the Motion	2
Preliminary Statement	2
The Question Presented Is Not Substantial	4
A. Commission Jurisdiction is Discretionary and Quite Restricted	4
B. Congress Did Not Intend to Permit Judicial Review of An Order Discontinuing an Investigation Under Section 13a(1)	7
C. Section 10 of the Administrative Procedure Act Further Nullifies Appellants' Claim for Judicial Review	12
Conclusion	14

TABLE OF CASES AND STATUTES CITED.

Decisions of Courts.

	PAGE
Arrow Transp. Co. v. *Southern R. Co.*, 372 U. S. 658 (1963)	3, 13
Bergen County v. *United States*, 359 U. S. 27 (1959)	5, 9
State of New Jersey v. *United States*, 168 F. Supp. 324 (D., N. J., 1959)	10

Statutes Cited.

Interstate Commerce Act:

	PAGE
Section 13a(1) [49 U.S.C.A. 13a(1)]	2, 4, 5, 6, 7, 8, 9, 11, 12, 13
Section 13a(2) [49 U.S.C.A. 13a(2)]	4, 8, 9
Section 1(18)-(22) [49 U.S.C.A. 1(18)-(22)]	7, 8

Administrative Procedure Act:

Section 10 [5 U.S.C.A. 701]	12

Other Sources.

Administrative Law Treatise, Sec. 28.16, Vol. 4, p. 80	12
U. S. Code Cong. and Admin. News, p. 3468 (1958)	4

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 1364

CITY OF CHICAGO, ET AL., - - - *Appellants,*

v.

UNITED STATES OF AMERICA, ET AL., - *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION TO AFFIRM AND BRIEF IN SUPPORT OF THE MOTION.

I

THE MOTION.

Appellee, Louisville and Nashville Railroad Company (hereinafter referred to as L&N), pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that the final judgment of the district court be affirmed on the ground that the question presented is so insubstantial as not to warrant further argument.

II

BRIEF IN SUPPORT OF THE MOTION.

Preliminary Statement.

Appellants attack an order of the court below in which that court dismissed the complaint of appellants for the reason that the court had no jurisdiction to review an order of the Interstate Commerce Commission discontinuing an investigation conducted by the Commission under Section 13a(1) of the Interstate Commerce Act [49 U.S.C.A. 13a(1)].

This case involves the discontinuance by the L&N of its passenger trains Nos. 6 and 7 which formerly operated between Cincinnati, Ohio, and New Orleans, Louisiana. Those trains connected with another pair of L&N passenger trains operating between Evansville, Indiana, and Atlanta, Georgia, Nos. 3 and 4, which in turn connected with passenger trains Nos. 54 and 93 of the Chicago and Eastern Illinois Railroad Company (C&EI) which operated between Chicago, Illinois, and Evansville, Indiana.*

On April 3, 1968, the L&N gave notice to the Commission, pursuant to Section 13a(1) of the Act, that, effective May 7, 1968, it would discontinue operations of passenger trains Nos. 6 and 7. The Commission on April 24, 1968, instituted an investigation into such discontinuance, the effect of which was to require the L&N to continue operation of Nos. 6 and 7 for a maximum period of four months beyond the May 7, 1968

*The discontinuance by C&EI of its trains Nos. 54 and 93 is involved in No. 1363 before this Court.

date. After hearing, the Commission, by order served September 6, 1968, discontinued its investigation, but, on that day and before L&N discontinued operation of Nos. 6 and 7, some of the appellants herein filed a complaint in the court below and sought and obtained a temporary restraining order, requiring L&N to continue operation of the trains until further order of the court.*

On January 8, 1969, the court below dissolved that restraint and dismissed the complaint, and, on the same day, refused to reimpose the restraining order pending the hearing of the appeal to this Court.

On the following day, January 9, 1969, appellants applied to Mr. Justice Marshall for a stay, which was denied by him on January 13, 1969.

Thereafter, notice of appeal was filed, and on May 5, 1969, appellants filed their jurisdictional statement (copy of which was received by L&N on May 7, 1969), raising the issue of whether an order of the Commission discontinuing an investigation under Section 13a(1) of the Interstate Commerce Act is subject to judicial review.

---

*The effect of the restraining order of the court below was to extend beyond the statutory four-month suspension period the date for the discontinuance of trains Nos. 6 and 7. Cf. *Arrow Transp. Co.* v. *Southern R. Co.*, 372 U. S. 658 (1963).

THE QUESTION PRESENTED IS NOT SUBSTANTIAL.

A. Commission Jurisdiction is Discretionary and Quite Restricted.

The Commission, before enactment of Section 13a(1) of the Interstate Commerce Act in 1958, had no jurisdiction over the discontinuance of interstate passenger trains, and railroads seeking to discontinue unneeded and unprofitable trains were faced with the piecemeal approach of seeking authority to do so from the regulatory bodies in each of the states through which the trains operated. Relief from state commissions was often difficult to obtain and time-consuming; accordingly, the railroads, in financial straits in the 1950's, were often prevented unnecessarily by state commissions from eliminating unneeded and costly passenger trains H. Rep. No. 1922, 85th Cong. 2d Sess. (1958), 1958 U. S. Code Cong. and Admin. News, p. 3468.

Against this background and to permit carriers promptly and effectively to discontinue unneeded services, Section 13a(1) was included in the Transportation Act of 1958, giving to the Commission, for the first time, authority over the discontinuance of interstate passenger trains.*

That authority is, however, discretionary and quite restricted. Section 13a(1) provides in essence that a carrier operating an interstate passenger train may discontinue that train by filing a notice and statement

*The Transportation Act of 1958 also added Section 13a(2), later discussed, giving to the Commission jurisdiction over intrastate passenger trains under certain circumstances.

with the Commission at least thirty days before the date of the proposed discontinuance.

The carriers then may discontinue the service on the effective date of the notice, "except as otherwise ordered by the Commission." The Commission is given authority to institute an investigation during the thirty-day period, and it *may* require the carrier to continue operation of the train pending hearing and decision in such investigation *for a maximum period of four months.* After hearing in such investigation, the Commission *may,* if it finds that the public and necessity require and interstate or foreign commerce is not unduly burdened, require continued operation for a maximum period of one year. If the Commission issues such an order then, at the end of the year, its jurisdiction ceases, but the carrier may start over before the Commission, again invoking the provisions of Section 13a(1) in the manner discussed.

If the Commission elects *not* to conduct an investigation, the carriers can eliminate the trains on the scheduled date without any affirmative action or approval from the Commission. Such decision is not subject to judicial review. *Bergen County* v. *United States,* 359 U. S. 27 (1959).

Appellants contend that it is "patently unfair" to deny judicial review of their case (Juris. St. in No. 1363, pp. 11, 12). In response to that contention, it is sufficient to point out that the states and communities do not have a right to judicial review of an order under Section 13a(1) where the Commission refuses to in-

vestigate the discontinuance. Obviously, the alleged interest of states and communities is as prominent in the circumstance where the Commission does not investigate as where it does. Accordingly, there is no basis for appellants to contend, as they do, that they are entitled to judicial review simply in the interest of "fairness."

Congress did not see fit to allow judicial review at the instance of protesting states and communities. Otherwise, the railroads would again be faced with the same kind of lengthy and costly delays in eliminating unneeded passenger trains, an abuse which Congress corrected in enacting Section 13a(1). The legislative scheme is, therefore, clearly one for which no judicial review was contemplated.

The statute is self-implementing, authorizing a carrier to discontinue service without any action on the part of the Commission. It is the statute, not the Commission, which authorizes the discontinuance. The only substantive power over a discontinuance which the Commission has under Section 13a(1) is that it *may* require the carrier to continue to operate for one year if, after investigation, the Commission, in the exercise of its sole discretion, finds that such one-year continuance is required by public convenience and necessity and will not unduly burden interstate or foreign commerce.

The provisions of Section 13a(1), therefore, are clear and, as written, that section does not permit appellants to obtain judicial review.

B. Congress Did Not Intend to Permit Judicial Review of An Order Discontinuing an Investigation Under Section 13a(1).

As we have shown, the self-implementing nature of the provisions of Section 13a(1), as written by Congress, do not support appellants' argument that they are to be granted judicial review. Furthermore, comparisons of Section 13a(1) with other provisions of the Interstate Commerce Act and with recent legislative proposals concerning passenger train discontinuances establish that Congress never intended such review.

In this regard it is well to compare Section 13a(1) with other provisions in the Act—Section 1(18)-(22) [49 U.S.C.A. 1(18)-(22)], for example, since those provisions were under consideration by Congress when Section 13a(1) was enacted (please see H. Rep. No. 1922, 85th Cong., 2nd Session (1958), 1958 U. S. Code Cong. and Admin. News, p. 3468). Section 1(18)-(22) deals with, among other subjects, the abandonment of a line of railroad. It provides that no carrier *shall* abandon a line of railroad unless and until there *shall* first have been obtained from the Commission a certificate that the present or future public convenience and necessity *permit* of such abandonment. In other words, a railroad receives no right from the statute to abandon a line of railroad. Congress has delegated to the Commission the authority to decide, under certain standards, whether or not a line should be abandoned, and until the authority is granted to the railroad, it cannot abandon the line. In addition to the right of an inter-

ested party to seek and obtain judicial review of an abandonment order of the Commission, the statute provides for injunctive relief at the suit of the United States, the Commission, a state regulatory body or "any party in interest," to prevent any abandonment of a line of railroad without Commission authority.

Obviously, in enacting Section 13a(1), Congress could have followed the legislative principles embodied in Section 1(18)-(22), delegating to the Commission complete authority to pass on each proposed train discontinuance and making it unlawful for any railroad to discontinue a train unless and until the Commission authorized such discontinuance. Had Congress done so, there would be no question that the train discontinuance would have been subject to judicial review. Congress, however, in enacting Section 13a(1) did not see fit to follow this pattern, obviously for the reason that it was seeking to expedite train discontinuances and to avoid the needless delays formerly experienced by the railroads in proceeding before state regulatory bodies. Congress did not wish to force the railroads to be bogged down in endless administrative proceedings before the Commission and later in the courts in discontinuing unneeded passenger trains that were draining the revenues of the carriers.

In addition, if Congress had intended that an order of the Commission discontinuing an investigation under Section 13a(1) be subject to judicial review, it would have tracked the language which Congress used when it enacted Section 13a(2), the latter statute dealing

with the discontinuance of intrastate passenger trains and having been enacted at the same time as Section 13a(1). Section 13a(2) contains no provision for automatic discontinuance of a train. It requires a carrier to apply to the Commission for authority to effect discontinuance, but permits such application only if the discontinuance is forbidden by state law or by the state commission or if the state commission has not acted promptly. Discontinuance of a train under the provisions of Section 13a(2) cannot be effected unless and until the Commission expressly authorizes the discontinuance by appropriate order. Such order may be entered only after full hearing and upon the making of certain findings specified in the statute. Thus, it is plain that Congress took a sharply different approach in enacting Section 13a(1), permitting automatic statutory discontinuance by the carrier, and Section 13a(2), requiring prior Commission approval, after hearing and appropriate findings, for such discontinuance.

That Congress did not intend judicial review of an order of discontinuance under Section 13a(1) is further supported by this Court's decision in *Bergen County* v. *United States,* 359 U. S. 27 (1959). That case involved the discontinuance of passenger ferries by railroad under the provisions of Section 13a(1). Appropriate notice of discontinuance was filed by the carrier, and protests were lodged by the State of New Jersey and its regulatory body with the Commission. The Commission, in the exercise of its discretion, did not investigate, issuing a written notice to the parties to that effect, and the ferries were discontinued

in accordance with the railroad's thirty-day notice. A complaint was filed by New Jersey and others seeking to set aside the Commission's notice and to require the Commission to investigate the discontinuance. The lower court denied the complaint in *State of New Jersey* v. *United States,* 168 F. Supp. 324 (D., N. J., 1959), on the grounds that Section 13a(1) did not permit judicial review. That decision was affirmed *per curiam* in the *Bergen* case.

Accordingly, this Court recognizes that (1) no judicial review is allowed if no investigation is ordered by the Commission, and, following the rationale of the district court's opinion in the *New Jersey* case, (2) no judicial review would presumably be allowed by this Court if the Commission issues no order discontinuing the investigation after an investigation during the four-month suspension period. In other words, if the Commission, after conducting an investigation, should not have issued any order either continuing the train's operation for one year or terminating the investigation, the train would be discontinued by operation of the statute. No judicial review of such inaction is available.

Therefore, it would indeed be a strained interpretation of the Congressional intent, if (3) judicial review were permitted, simply because the Commission issued an order discontinuing the investigation, when otherwise no judicial review could be obtained.

It is also significant to note that a number of bills related to passenger train discontinuances have been

introduced in Congress since the enactment of Section 13a(1) containing provision for judicial review. For example, H. R. 18212 and S. 3861 introduced in June of 1968 in the second session of the 90th Congress each contained the following provision:

> "13a(3) Any State, administrative or regulatory agency of a State, or person, adversely affected or aggrieved by an order of the Commission entered pursuant to paragraph (1) or (2) of this section, may bring suit to obtain judicial review thereof under those provisions of law applicable in the case of suits to enjoin, suspend, or set aside orders of the Commission."

Obviously, therefore, if existing law provides for judicial review of a Commission order discontinuing an investigation under Section 13a(1), there would be no need whatever to add the above quoted language to the statute.

If Congress had provided for judicial review, it can safely be assumed that in every instance where a train was discontinued under the provisions of Section 13a(1), and notwithstanding the unneeded and losing nature of the particular service being performed, the matter would be taken to court and the trains would likely be operating while the judicial processes are exhausted. Such a provision in the law, however, would have been directly contrary to the circumstances leading up to, and the purpose of, the enactment of Section 13a(1). Needless delays which the railroads formerly experienced in proceedings before state regulatory

bodies would simply have been transferred to the federal courts without any concomitant benefit to the railroads or to the public which rely on them for needed transportation services.

C. Section 10 of the Administrative Procedure Act Further Nullifies Appellants' Claim for Judicial Review.

In 1958, when Congress enacted Section 13a(1) of the Interstate Commerce Act, it did so with full knowledge of the provisions of Section 10 of the Administrative Procedure Act [5 U.S.C.A. 701], the introductory clause of which further narrows the scope of judicial review of agency action. In pertinent part, Section 10 provides:

> "(a) This chapter applies, according to the provisions thereof, except to the extent that . . . (2) agency action is committed to agency discretion by law."

Accordingly, as Professor Davis has stated in *Administrative Law Treatise,* Vol. 4, Section 28.16, p. 80:

> "All of section 10 of the Administrative Procedure Act, dealing with judicial review, is modified by the two parts of the introductory clause, one part of which is: 'Except so far as . . . agency action is by law committed to agency discretion—. . . ' Whatever the scope of review prescribed by subsection (e) when read alone, the scope of review is narrowed by the introductory clause to the extent that the action is by law committed to agency discretion. For instance, although subsection (e) provides that the review-

ing court shall set aside agency action found to be 'arbitrary [or] capricious,' the reviewing court may not set aside arbitrary or capricious action so far as agency action is by law committed to agency discretion. All other clauses of subsection (e) and of the rest of section 10 are similarly modified by the introductory clause."

To the limited extent that Congress granted the Commission power to act in passenger train discontinuances, such power is, unquestionably, committed to the sole discretion of the Commission and, consequently, the exercise of that discretion is not subject to judicial review. Section 13a(1) grants complete discretion to the Commission to determine whether or not an investigation shall be conducted. If an investigation is held, then, again, the Commission has complete discretion to decide whether or not the railroad is to be required to operate the trains for another year, basing such decision, where continuance is required, on the grounds that continued operation for one year would not constitute a burden on interstate or foreign commerce.

It is difficult to imagine any statute where the subject matter is more clearly and completely committed to agency discretion. The commitment to the Commission's discretion under Section 13a(1) is similar to the Commission's discretion in the matter of suspension of rates which, when exercised, is not subject to judicial review. *Arrow Trans. Co.* v. *Southern R. Co.*, 372 U. S. 658.

CONCLUSION.

Since the appellants present no substantial question for the decision of this Court, the final judgment of the district court should be affirmed.

Respectfully submitted,

CLIFFORD T. COOMES,
JOSEPH L. LENIHAN,
JAMES W. HOELAND,
908 W. Broadway,
Louisville, Kentucky 40201,

Attorneys for Appellee, Louisville and Nashville Railroad Company.

Of Counsel:

HARRY R. BEGLEY,
38 South Dearborn St.,
Chicago, Illinois 60603.

Dated: June 4, 1969.